

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LUCIANO ALEX HERNANDEZ,

Defendant-Appellant.

UNPUBLISHED

March 14, 2006

No. 258491

Saginaw Circuit Court

LC No. 03-023660-FC

Before: Smolenski, P.J., Whitbeck, C.J., and O'Connell, J.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree premeditated murder, MCL 750.316(a), possession of a firearm while committing a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. He was sentenced, as an habitual second offender, MCL 769.10, to concurrent terms of life imprisonment without parole for the first-degree murder conviction and 47 months' to 7 ½ years' imprisonment for the felon in possession conviction, to be preceded by a consecutive sentence of two years' imprisonment for the felony-firearm conviction. We affirm.

This case arose when the victim, who was intoxicated, responded to a racial insult and bump by shouting and belligerently refusing to leave a liquor store. The owner called a local bar owner, who came to the scene with a bouncer. Both of these men were armed with pistols. The altercation spilled out into the street, where the victim's intoxicated nephew joined him in challenging the growing crowd, which included defendant. One of the men threatened the crowd with a whiskey bottle, and one of them alluded to having a firearm. After the bar owner arrived, he wisely decided to call the police. While he was on the phone, however, defendant reached around him, pulled his pistol from his waistband, and started shooting at the ground near the victim and his nephew. The victim immediately began backing away, and defendant called him a coward, raised the pistol, and shot him in the face, killing him instantly.

Defendant first argues that the trial court abused its discretion when it denied his motion for a new trial on the ground that his convictions were against the great weight of the evidence. We disagree. A new trial may be granted if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). We review for abuse of discretion a trial court's decision regarding whether evidentiary deficiencies justify a new trial. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). A motion for new trial should only be granted when the evidence

heavily preponderates against the verdict and the motion's denial constitutes a serious miscarriage of justice. *People v Lemmon*, 456 Mich 625, 641; 576 NW2d 129 (1998).

To sustain a conviction for first-degree murder, "the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Here defendant challenges the elements of premeditation and deliberation. To prove premeditation and deliberation, the prosecution must show that, before acting on the decision to kill, the defendant considered taking the victim's life and evaluated the decision's primary aspects for some appreciable, but unspecified, amount of time. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). The elements of premeditation and deliberation require "substantially more reflection on and comprehension of the nature of the act than the mere amount of thought necessary to form the intent to kill." *Id.* at 301. The defendant must have had time to take a "second look" at his actions or "pause" between the thought and the action itself. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999); *Plummer, supra* at 300-301. The jury can infer premeditation and deliberation, as well as intent, from the circumstances as long as the record supports the inference and it is not merely speculative. *Plummer, supra* at 301. Minimal circumstantial evidence is sufficient to prove an actor's state of mind. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

In the present case, defendant was not initially carrying a weapon, so to obtain the pistol he had to move around other members of the crowd, reach around the pistol's owner, and pull the pistol from the owner's waistband. Defendant had difficulty removing the pistol from the waistband and broke a belt clip for the owner's cellular phone while wrestling the pistol free. The owner physically attempted to stop defendant from taking his pistol, but defendant fought him off. Although he may have initially aimed at the ground, defendant ultimately aimed directly at the victim's head while calling him a coward. From these facts, the jury could reasonably infer that defendant fully intended to kill the victim from the moment he headed for the pistol, and that his initial shots at the victim were either poorly aimed or unsuccessful attempts to induce the victim to draw his own weapon so defendant could kill him with perceived impunity. The victim was at least backing up, if not running away, when defendant shot him, so the jury had adequate reason to reject defendant's self-defense claims. Moreover, once the victim had fallen, defendant turned the weapon on the victim's nephew, negating any reasonable claim that the fatal shot was the result of mere impulse. Additionally, defendant buried the pistol and threw his clothes in a dumpster, indicating his knowledge of his own culpability.

Under the circumstances, the evidence shows that defendant had ample time to take a "second look" at his lethal actions before taking them. *Abraham, supra*. Although there was some conflicting evidence regarding whether defendant aimed directly at the victim or believed his girlfriend was in danger, the question of credibility is ordinarily left for the fact-finder. *Lemmon, supra* at 642-643. The prosecutor presented strong, competent evidence to support the jury's verdict, so the trial court did not abuse its discretion in denying defendant's motion for new trial.

Defendant next argues that the trial court erred by refusing his request for voluntary and involuntary manslaughter jury instructions. However, any possible error in this regard was harmless, because the jury had a choice to convict on the intermediate charge of second-degree

murder and yet convicted defendant on the greater offense of first-degree murder. *People v Wilson*, 265 Mich App 386, 395-396; 695 NW2d 351 (2005).

Affirmed.

/s/ Michael R. Smolenski

/s/ William C. Whitbeck

/s/ Peter D. O'Connell